SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
DEC 18 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-731

FRED THOMAS, SHERIFF, D. C. YEARWOOD, DEPUTY SHERIFF, and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

vs.

E. E. MORGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

RESPONSE TO PETITIONER'S "QUESTIONS PRESENTED"

We disagree with Petitioner's statement of the questions presented. If this Court has any concern for the controversy between the parties, it is with three narrow issues. As stated by the Court of Appeals:

> "We are thus presented in this appeal with two narrow issues: first, whether the privilege against self-incrimination can be relinquished by contract prior to the development of circumstances which would

make its exercise appropriate; and, secondly, whether the privilege can be lost under the traditional doctrine of equitable estoppel under the facts presented here."

The Court of Appeals held that Morgan was entitled to assert the privilege and that the privilege had not been relinquished by contract or conduct. This holding fully vindicated all constitutional claims and these have become moot.*

The third question is: May a federal court grant to a state court litigant an immunity from state criminal prosecution where no such immunity is allowed under state law and where such an immunity cannot even be granted by the state court itself.

The third question, above stated, arises exclusively on a theory of federal supremacy unilaterally advanced by Judge Gewin as the basis for his dissent below. It was neither advanced by any party nor adopted by the Court and, with deference, is unsupported by reason or authority.

RESPONSE TO PETITIONER'S "SUMMARY OF REASONS FOR GRANTING THE WRIT"

Rule 19 reasons assigned are limited to the contention that the decision below "conflicts in principle with prior decisions of this Court." The remaining assignments merely reflect a continuing controversy of interest only to the parties and of no discoverable immediate public signifi-

*When the decision of the Supreme Court of Mississippi was the subject of a Petition for Writ of Certiorari filed in this Court (No. 70-344), Petitioner filed a response to a petition to stay enforcement of the State Court judgment and stated in part as follows:

"Second, it is obvious and apparent that if the Fifth Circuit reverses the denial of habeas corpus relief and directs the discharge of Morgan, the State Court civil contempt case will become moot, and there will be no necessity whatsoever for any stay of the State Court judgment."

cance. Cf. *Rice* v. *Sioux City Memorial Park Cemetery* (1955), 349 U.S. 70, 75 S.Ct. 614.

A conflict has been cited as existing between the decisions of the Supreme Court of Mississippi and the Court of Appeals for the Fifth Circuit. But the conflict is not related to state law. All questions presented to the Court of Appeals were federal questions and its decision on these questions controls this case. There is no cited conflict among federal courts of appeal on the same matter, and this applies equally to the question raised by Judge Gewin's dissenting opinion, as will be later demonstrated.

The single Rule 19 reason, above quoted, simply is non-existent. In fact, the decision of this Court in the case of *McCarthy* v. *Arndstein* (1924), 266 U.S. 34, 45 S.Ct. 16,* is directly in point, holding that the privilege is available even to a bankrupt on interrogation to discover his estate, not listed in his schedule of assets, where concealment of assets is a criminal offense.

The cases from this Court principally relied upon by Petitioner, namely *Shepard* v. *Barron* (1904), 194 U.S. 553, 24 S.Ct. 737, and *Zap* v. *United States* (1946), 328 U.S. 624, 66 S.Ct. 1277, were correctly distinguished by the Court of Appeals.

Petitioner's reliance on the famous case of *Boyd* v. *United States* (1886), 116 U.S. 616, 6 S.Ct. 524, is misplaced. Not only that, but Boyd is a clear case in support of the availability of the privilege in the very circumstances of the present case and the fragmented quotation on page 20 of the petition is nothing short of a shocking misrepresenta-

*There was a series of *McCarthy* cases, cited as follows: *Arndstein* v. *McCarthy* (1920), 254 U.S. 71, 41 S.Ct. 26; *Arndstein* v. *McCarthy* (1920), 254 U.S. 379, 41 S.Ct. 136; *McCarthy* v. *Arndstein* (1923), 262 U.S. 355, 43 S.Ct. 562; and *McCarthy* v. *Arndstein* (1924), 266 U.S. 34, 45 S.Ct. 16.

tion of the Court's decision. Quoted in full context, with the *omissions* in Petitioner's quotation given in italics, the Court held:

> "*The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the fourth or fifth amendment, or any other clause of the constitution;* nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments. *But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt;* and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery. *Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.*" (6 S.Ct. at 529, 116 U.S. at 624).

Also:

> *"Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."* (6 S.Ct. at 533).

So it is in the case at bar. The U.S.F. & G., as judgment creditor, had and still has available to it every form of judicial process, such as writs of execution, garnishment, injunction and even receivership, all without constitutional objection. The judicial pursuit is restrained only when the Court attempts to extort discovery from the judgment debtor which could incriminate him. *McCarthy* v. *Arndstein*, supra.

All of the processual justice has been administered in favor of the U.S.F. & G.—execution, garnishment, mandatory injunction, prohibitory injunction and receivorship—which the Constitution of the United States allows. We simply have asked that Morgan be given the Fifth Amendment protection to which every individual in this nation is entitled. Thus restricted, the narrow question presented here is whether that protection is to be granted or is to be subordinated to Petitioner's sense of civil justice and to the state court's concern for the enforcement of civil money judgments. No court here-

tofore has subordinated the privilege on any such considerations and, we submit, there is no reason why the Fifth Circuit's vindication of constitutional claims should be disturbed.

RESPONSE TO PETITIONER'S "STATEMENT OF THE CASE"

Petitioner's statement is an admixture of facts, fictions and wishful conclusions. It presents nothing new. The same argumentative statement was made below, prefaced there with such statements as that this case is "peculiar and unique" on its facts.

The Court of Appeals, with the benefit of the full record and full detailed arguments, distilled the essential facts from the admixture and discarded that which was irrelevant or non-factual. We stand on the statement of the case as contained in the opinion below.

For the purposes of this response, we add only that Petitioner's continued emphasis on what it asserts to be the "peculiar and unique facts involved" serves at this point to imply that the case is one involving only the peculiar private interests of the parties before the Court. This is the antithesis of the announced requirement that the case deserving of certiorari review must transcend the purely private interest of the parties and involve a matter of immediate public significance. *Rice* v. *Sioux City Memorial Park Cemetery,* supra.

Therefore, the case either flows in the mainstream of routine commercial transactions or flows outside in a private channel, propelled by its peculiar and unique facts. If in a private channel, it has received all of the judicial attention that it deserves. If in the mainstream, a decision contrary to that rendered below would serve to rubber-stamp the great privilege out of existence in this

broad area of individual involvement. Cf. Judge Frank's opinion in *United States* v. *Field* (CA 2, 1951), 193 F.2d 92 at 107, quoted at pages 17-18 of the opinion below.

RESPONSE TO DETAILED "REASONS FOR GRANTING THE WRIT"

I.

Echoing the opinion of the state court, Petitioner argues that the decision below unduly impairs the state's ability to enforce civil judgments.

We respond that every process for enforcement remains available. It is only when the judgment creditor is called upon to incriminate himself out of his own mouth or by his own hand that the Constitution becomes involved. See *Boyd* v. *United States* (1886); 116 U.S. 616, 6 S.Ct. 524.*

No court has ever heretofore subordinated the privilege on the basis of a concern for its enforcement powers. The state court's subordination of Fifth Amendment rights out of concern for its collection powers runs head-on into the contrary holding of the Supreme Court of the United States in the *McCarthy* cases, supra, and to the numerous other decisions, both federal and state, which have upheld the privilege claim in civil debtor proceedings for collection and discovery, where concealment is made a criminal offense.

30 Am.Jur.2d, Executions, § 826, states:

> "A statute providing for the examination of the judgment debtor to determine whether he has any property subject to execution is unconstitutional if

*We have previously quoted from this famous case and have pointed out that the fragmented quotation included in the petition at page 20 is wholly misleading.

such examination is made compulsory and no provision is made for such immunity from prosecution as is requisite when self-incriminatory testimony is required. . . ."*

The cases cited to the above-quoted text arose in states which have statutes making it obligatory upon debtors to strictly discover their assets in post-judgment collection proceedings. Of necessity, these statutes write

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Horstman v. *Kaufman* (1881), 97 Pa. 147, 39 Am. Rep. 802, cited to the above text, involved the attempted statutory examination of the judgment debtor on oath as to his property. The Court held that the statute was unconstitutional under the self-incrimination clause of the State Constitution, since fraudulent concealment was a statutory misdemeanor.

Mitchell v. *Godsey* (1944), 222 Ind. 527, 53 N.E.2d 150, also cited to the text, involved a statutory post judgment creditor's action seeking discovery of assets. The Court upheld the act, but only because, despite its mandatory language, the defendant could not be "compelled to answer any question which would tend to incriminate him."

The Court cited its prior decision in *Overman* v. *State* (1924), 194 Ind. 483, 143 N.E. 604, which held that incriminating testimony could not be required "even though a statute purports to require the giving of such testimony."

Also, see: *Ex parte Clarke* (1894), 103 Cal. 352, 37 P. 230, holding that an insolvent debtor could not be compelled to make disclosures where concealment was criminal, absent a statute granting complete immunity from criminal prosecution; and *North* v. *Kirtley* (Mo., S.C. 1959), 327 S.W.2d 116, upholding the privilege in a proceeding under a post judgment discovery statute providing for the examination of judgment debtors.

By application of the same principles, the same result is reached in reference to pre-trial interrogations. See *Levine* v. *Bornstein* (1958), 174 N.Y.S.2d 574, and cases cited, including *Owen* v. *Fisher* (N.Y. 1947), 66 N.Y.S.2d 856, holding that the privilege is available to a party in a civil proceeding when claimed on a pre-trial discovery deposition. See also to the same effect: *Akers* v. *Fuller* (1950), 312 Ky. 502, 228 S.W.2d 29; *Kindt* v. *Murphy* (1950), 312 Ky. 395, 227 S.W.2d 895; *Muniford* v. *Croft* (Del., 1952), 93 A.2d 506; *American Cyanamid Co.* v. *Sharff* (CA 3, 1962), 309 F.2d 790. The Kentucky Court cited appropriately *Boyd* v. *United States* (1886), 116 U.S. 616, 6 S.Ct. 524.

Time and time again, the same principle has been applied in the Federal Courts in reference to civil discovery proceedings. There are no exceptions. In addition to *McCarthy* v. *Arndstein*, supra, and *Boyd* v. *United States*, supra, see *United States* v. *Saline Bank of Virginia* (1828), 1 Pet. 100, 7 L.Ed. 69; *Murphy* v. *Waterfront Commission of New York Harbor* (1964), 378 U.S. 52, 84 S.Ct. 1594; *Application of Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428.

themselves into every commercial contract. Yet, no waiver has ever been constructed out of either contract or conduct in those jurisdictions, and not once before has a court hesitated to honor the privilege out of any concern for its collection powers.

It is submitted that there is no threat to the powers of the judicial branch of the government, other than that required by the Fifth Amendment.

As to the claim that the application of the constitutional privilege may produce undesirable consequences as between the private litigants, this fact has never been regarded as a sufficient basis on which to deny the privilege when claimed in civil actions. *8 Wigmore on Evidence,* 3rd Ed., § 2257. *In re Nachman,* 114 Fed. 995,* held that:

> "The courts cannot deprive a citizen of the constitutional right invoked by him for his protection upon only consideration of inconvenience or for the purpose of administering what it may regard as a salutary and useful law."

In re Walsh, 104 Fed. 518,** pointed out that:

> "I can see that in some instances the fact that the bankrupt stands upon his constitutional guaranty would interfere with the proper administration of the bankruptcy law, but that is not a question which the court has the power to remedy."

See *Levine* v. *Bornstein* (1958), 174 N.Y.S.2d 574, and cases cited, including *Owen* v. *Fisher* (N.Y. 1947), 66 N.Y.S.2d 856, holding that the privilege is available to a party in a civil proceeding when claimed on a pre-trial discovery deposition:

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*This case was cited in the *McCarthy* cases, supra.

**This case was cited in the *McCarthy* cases, supra.

"The court is fully aware of the serious consequences that might be involved, but the court must accept the law as it is and cannot set aside a well established privilege granted and guaranteed to a citizen because the exercise of such privilege may result in undesirable consequences."

II.

Petitioner argues that the decision of the Court of Appeals conflicts with prior decisions of this Court on the waiver or estoppel point.

We respond that this Court has never held that the Fifth Amendment privilege could be bargained away by a stock phrase in the fine print of a commercial contract between private parties or that non-payment of one's debts by a guarantor in breach of contract could serve to subordinate the privilege by waiver or estoppel or on any other theory.

A guarantor who indemnifies a surety company is no different in principle from an endorser on a promissory note or from a debtor such as Arndstein whose privilege was sustained in bankruptcy proceedings. *McCarthy* v. *Arndstein* (1924), 262 U.S. 34, 45 S.Ct. 16, and related cases in the *McCarthy* series.*

We do not dispute the general principles of waiver and estoppel. These concepts simply do not fit this case and the Court of Appeals correctly so held. *Shepard* v. *Barron* (1904), 194 U.S. 553, 24 S.Ct. 737, *Zap* v. *United States* (1946), 328 U.S. 624, 66 S.Ct. 1277, and the *Wigmore* text were discussed and distinguished in the opinion of the Court of Appeals. We add the comments below:

*There was a series of *McCarthy* cases, cited as follows: *Arndstein* v. *McCarthy* (1920), 254 U.S. 71, 41 S.Ct. 26; *Arndstein* v. *McCarthy* (1920), 254 U.S. 379, 41 S.Ct. 136; *McCarthy* v. *Arndstein* (1923), 262 U.S. 355, 43 S.Ct. 562; and *McCarthy* v. *Arndstein* (1924), 266 U.S. 34, 45 S.Ct. 16.

Shepard v. *Barro.* (1904), 194 U.S. 553, 24 S.Ct. 737, much relied upon for the "waiver by conduct" theory, involved only the question of whether an individual could challenge the constitutional validity of a state tax assessment statute after having sought and accepted its benefits. The Fifth Amendment privilege against self-incrimination was not involved.

Zap v. *United States* (1946), 328 U.S. 625, 66 S.Ct. 1277, cited to the "waiver by contract" theory, involved a search and seizure of business records, and not a testimonial discovery from the individual involved. The case involved a contract with the Navy Department to be performed on a cost-plus basis. The government was defrauded by a false certification of a cost item and by utilization of a fictitious check posted on the contractor's books. The Court said:

> "Congress has provided for the inspection and audit of books and records of contractors such as petitioner . . . . And petitioner's contract with the Navy Department provided: 'The accounts and records of the contractor shall be open at all times to the Government . . . .'" (66 S.Ct. at 1278-1279).

The question was whether a search (audit inspection) of the books and seizure of the fictitious check without a warrant or with a defective warrant was lawful or so unreasonable as to violate the Fourth Amendment "as respects business documents related to those contracts." The Court dealt only with "the law of searches and seizures."

Zap emphatically did not hold that the contractor could be forced to furnish out of his own mouth or by his own hand a testimonial confession which could tend to incriminate for the crime charged. It held only that the search and seizure was not unreasonable and was therefore

lawful in view of (1) the federal statute, (2) the contract, and (3) the absence of force, fraud or trickery in obtaining access to the business records required by law to be kept open to inspection.

Zap should be read in conjunction with another decision rendered the same day and authored by the same Justice, namely *Davis* v. *United States* (1946), 328 U.S. 582, 66 S.Ct. 1256.

Both of these cases, *Davis* and *Zap*, involved the question of the admissibility of documentary evidence seized by federal officers in a search conducted without a warrant and involved only Fourth Amendment rights. Neither case involved the Fifth Amendment privilege against testimonial incrimination.

The Fourth Amendment prohibits "unreasonable" searches and seizures, from which it follows that any search and seizure found to be reasonable is not objectionable under that amendment.* On the other hand, the Fifth Amendment is absolute in its provision that no person "shall be compelled" to be a witness against himself. It is therefore not enough under the Fifth Amendment to avoid the privilege by the assumption that it would be more reasonable and consistent with the administration of justice to require incrimination than to afford the protection which the amendment makes absolute upon appropriate claim thereto.

The state court relied upon *8 Wigmore on Evidence*, § 2275 (McNaughton Rev. 1961). But instead of supporting a prospective waiver by private contract in relation to enforce testimonial disclosures, the text states clearly that:

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*Wyman v. *James* (Jan., 1971), 91 S.Ct. 381: "It is unreasonableness which is the Fourth Amendment's standard." (91 S.Ct. at 386).

"A bare contract to waive the privilege will not be enforced *specifically*. . . ."

Ignoring the above quoted statement, reliance was placed upon the next paragraph of the *Wigmore* text, which is quoted (with emphasis by the Court) as follows:

"Where there are not only the ingredients of an express or implied contract to waive privilege but also a *fiduciary relation* or other elements of public policy making recognition of privilege unconscionable, the waiver of privilege may be specifically enforced and the witness held in contempt for failure to make disclosures . . . ."

But the quoted *Wigmore* exception to the "bare contract" rule cites only one case involving a constitutional plea of the Fifth Amendment privilege.* This is *United States* v. *Field* (CA 2, 1951), 193 F.2d 92. This case dealt with bail bond sureties who were viewed as being fiduciaries in the *public trust.*

Antieau, Constitutional Law, § 2:34, referring to *United States* v. *Field*, states:

"A lower federal court has held that giving bail constituted a waiver of the privilege with respect to questions 'close and direct' to the fulfillment of the surety's duty to produce the suspect. *The result is not only unsupported by precedent, but seems an indefensible extension of the waiver doctrine.*" (Emphasis added).

*The two other cases cited did not involve a claim of the Fifth Amendment privilege. One was an opinion by a Delaware Chancellor in 1851, *State* v. *Maury*, 2 Del. Ch. 141, involving a bill to enjoin a lottery, wherein the public interest was noted along with the *rule in chancery* against requiring disclosures that could incriminate or cause forfeitures. The other is an 1827 English Court decision. *Green* v. *Weaver* (1827), 1 Sim. 404, 57 Eng. Rep. 630.

Wigmore, in footnote No. 5, states:

> "About the *Field* case, supra, Mr. Boudin had this to say: 'This conclusion—that the privilege may be waived by advance contract—was not advanced by the government and is not supported by any decisions in this country . . . . The court . . . adopted a new rule, waiver by contract, which appeared to be contrary to settled American law.' Boudin, The Constitutional Privilege in Operation, 12 Law. Guild Rev. 128, 139-40 (1952)." (8 *Wigmore on Evidence,* at 455).

The majority opinion in the *Field* case has now been rejected by the Supreme Court of the United States and twice contradicted by the same Second Circuit Court of Appeals in which two of the same judges participated.

See: *Curcio* v. *United States* (1957), 354 U.S. 118, 77 S.Ct. 1145, especially 77 S.Ct. at 1150-1151 and footnote No. 6.

Since the *Field* majority view has been rejected, Judge Frank's dissent in *Field* (193 F.2d 102-109), becomes tellingly prophetic for the case at bar, highlighting as it does many of the views later adopted in decisions of this court and the dire consequences which inevitably must follow from a ruling which would write the Fifth Amendment out of commercial transactions. As noted by Judge Frank:

> "Thus, if my colleagues' decision is generally accepted, the sole practical effect of the constitutional privilege will be to add a few words to a contract. So the high hopes of Madison and his fellows, expressed in this Fifth Amendment privilege, will end up in a rubber-stamp contractual clause. Especially will all government employees be stripped of the privilege—by

contract. Before long, rubber-stamped out of existence, the privilege will be but a quaint item of antiquarian lore." (193 F.2d at 107).

III.

Petitioner argues that Morgan only imagines that he may be in danger of criminal prosecution.

We respond that Morgan has been openly accused of fraudulently concealing assets to avoid a lien. He has been openly accused of failing to include all of his assets in a conveyance ordered by the state Court. This directly involves him first in the statutory crime of larceny which carries a one-year jail sentence and, secondly, in criminal contempt.

If these charges are groundless, then discovery avails nothing whatever. If true, Morgan is guilty of larceny and criminal contempt. He is asked by Petitioner to confess guilt by his own hand. There is nothing about this which the law characterizes as "imaginary" or "elusive". Neither the District Court nor the Court of Appeals nor the state court concluded that the danger was unreal or unsubstantial. The mere fact that U.S.F. & G. may be more interested in civil relief than in criminal charges is beside the mark. It has never been seriously questioned that the privilege can be invoked in civil proceedings.

IV.

Petitioner argues that even if Morgan cannot be compelled to make a formal discovery, he should be required to file with the court a financial statement.

We respond that the financial statement is a part and parcel of the discovery and cannot be separated

therefrom and is governed by the same rules. The Court of Appeals considered this argument and made no distinction:

In the concluding portion of the District Court's opinion a distinction was suggested as between Petitioner's obligation to furnish a financial statement and his obligation to give a testimonial discovery apart from such statement. However, we submit that the financial statement is a part and parcel of the discovery and cannot be separated therefrom, and is governed by the same constitutional considerations.

The financial statement had absolutely no value or use except as an instrument of discovery. The decree even selected two dates long past, and required the financial statements to disclose Morgan's "current financial position" on each date for comparative purposes. The two dates selected were September 3, 1965 and August 7, 1967.

The prohibition of the Fifth Amendment is directed against the judicial extortion of information from a party or witness after claim of the privilege is made. The privilege extends to private papers as well as oral or written testimony. *The discovery decree in this case would not only compel Morgan to produce his private papers, but would actually require him first to create the paper out of his own mind and by his own hand, in all respects as if he were directed to write out and file a confession of guilt despite claim of the Fifth Amendment privilege.*

Extortion of information from a party by one coercive judicial means, such as a mandatory injunction to file with the court a true financial statement, is just as effective and just as violative of the *Constitution* as is coercion by any other means. *Boyd* v. *United States,* supra,

stands in the way of any attempt to extort from the party by judicial process his private books and papers.

The financial statements have no intrinsic value and could not conceivably serve any purpose whatsoever other than a testimonial discovery under judicial mandate in an attempted negation of Petitioner's substantive rights* to remain silent when accused of criminal concealment.

In ordering discovery, the chancellor himself observed that "whether this be done by a statement by way of discovery or by a financial statement, I think it matters very little".

V.

Taking its cue from that part of Judge Gewin's opinion which constituted a dissent, Petitioner argues that the Supremacy Clause of the Constitution dictates that the federal court grant to Morgan an immunity from state prosecution for state crimes.

This theory was not advanced by Petitioner in its brief before the Court of Appeals, but emanated unilaterally from the pen of Judge Gewin. Now adopted by Petitioner, an effort to justify this novel concept is made by citing three cases, viz: *Murphy* v. *Waterfront Commission* (1964), 378 U.S. 52, 84 S.Ct. 1594; *Uniformed Sanitation Men Association* v. *Commissioner* (CA 2,

Malloy v. *Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, repudiated the "concept of the privilege as a mere rule of evidence." (84 S.Ct. at 1494). *Miranda* v. *State of Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, cited *Malloy* to the point that "substantive standards" underlie the privilege. Cf. *United States* v. *Fernandez* (CA 5, 1970), 424 F.2d 1291, wherein the Fifth Circuit, citing *Murphy* v. *Waterfront Commission* (1964), 378 U.S. 52, 84 S.Ct. 1594, concluded: "Its exclusionary rule was also designed to give substantive effect to the privilege against self-incrimination." (424 F.2d at 1294).

1970), 426 F.2d 619, and *Kastigar* v. *United States* (CA 9, 1971), 440 F.2d 954.

These cases were not cited by Judge Gewin and understandably so, because they do not stand for the theory advanced. *Murphy* v. *Waterfront Commission*, supra, held that a witness may be compelled to testify by a state court where a state statute grants immunity although the testimony could incriminate the witness under federal law, but that when so compelled "the Federal Government must be prohibited from making any use of compelled testimony or its fruits."

The case certainly did not hold that a federal court might compel a witness to testify in a state court by granting to the witness a state immunity from prosecution for state crimes, where no state immunity was granted under state law.

Uniformed Sanitation Men Association v. *Commissioner of Sanitation*, supra, held that City of New York officials might grant to policemen a "use immunity" by requiring them to give information on penalty of discharge for refusal and could lawfully discharge the policeman for refusal to give the information.

This case held that compulsion engendered by the threat of discharge was enough to grant "use immunity" and that "use immunity", in turn, was enough to justify the policeman's discharge for refusal to answer. The Court did not hold that the policeman could be compelled to answer but held only that he could be discharged for refusal.*

*Cf. *Piccirillo* v. *New York* (1971), 91 S.Ct. 520; *In re Korman* (CA 7, 1971), 449 F.2d 32; *United States ex rel. Catena* v. *Elias* (CA 3, 1971), 449 F.2d 40.

In a footnote the Court said the same situation was not present in *Ellis* v. *United States* (D.C. Cir., 1969), 416 F.2d 791.

The *Ellis* case holds that a judge may not grant immunity from prosecution to a witness whose claim of privilege is recognized. The Court said:

> "The lack of judicial authority to grant immunity from prosecution to a witness whose claim of privilege is recognized also appears in opinions of this court. See Earl v. United States, 124 U.S.App.D.C. 77, 80, 361 F.2d 531, 534 (1966), cert. denied, 388 U.S. 921, 87 S.Ct. 2121, 18 L.Ed.2d 1370 (1967); In re Bart, 113 U.S.App. D.C. 54, 304 F.2d 631 (1962) (by implication)." (416 F.2d at 797, 798).

Kastigar v. *United States*, supra, held that a federal immunity statute is sufficient to compel answer before a grand jury if a "use immunity" is granted.*

It is well established that a judge or court may not grant to a witness an immunity from prosecution in exchange for his testimony which could expose him to criminal prosecution.

In *Isaacs* v. *United States* (CA 8, 1958), 256 F.2d 654, the Court said:

> "The court declared that it would grant immunity from prosecution if appellant would answer the interrogatories and it is argued that in these circumstances the appellant could not rely upon the Constitutional privilege of refusing to answer. The short answer to this contention is that the court was without authority to grant immunity from prosecution. The

*Cf. *Piccirillo* v. *New York* (1971), 91 S.Ct. 520; *In re Korman* (CA 7, 1971), 449 F.2d 32; *United States ex rel. Catena* v. *Elias* (CA 3, 1971), 449 F.2d 40.

attempt to grant such an immunity was not within the judicial power but was an attempted exercise of executive or legislative power. United States v. Ford, 99 U.S. 594, 25 L.Ed. 399; McCarthy v. Arndstein, 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158; Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511." (256 F.2d at 661).

See also *Ellis* v. *United States*, supra.

Whether a witness who is compelled to testify on a judicial threat of contempt, may receive a "use immunity" by reason of the compulsion implied from the unlawful judicial threat is not the question involved here. Although historically a witness has been required to stand on his privilege claim or waive it, we need not debate the question because Morgan did not succumb to the threat in this case but stood fast on his privilege claim and has not testified. It has now been decided that he was justified in so doing and that he is not punishable for contempt for his refusal. We, therefore, are not involved with a situation where a judge erroneously orders a witness to testify and the witness, mistaking his right to remain silent in the face of a contempt threat, gives testimony which is later sought to be used against him in a criminal case.

Instead, the question is whether a federal habeas court judge may grant to a state court witness or litigant a state immunity from state prosecution for a state crime and thereby give license to an immunity which has not been granted by the state legislature and which could not be granted by the state court in which the testimony is demanded.

Petitioner correctly states in its petition:

"Actually, however, the Mississippi Supreme Court has expressly held that it does not possess such power

(to grant immunity) *Hubbard* v. *McKey*, 193 So.2d 129, 131 (Miss. 1966)". The cited case so holds. The Court said:

> "Without some sanction of the law, or some law authorizing the granting of immunity, the court had no authority to grant same and was correct in refusing to tell the witnesses that they would obtain immunity from prosecution by testifying. 58 Am.Jur. Witnesses § 85 at 73 (1948); 98 C.J.S. Witnesses § 439, at 259-260, 263 (1957)."

And this is in line with the authorities in general. See *Apodaca* v. *Viramontes, Sheriff* (1949), 53 N.M. 514, 212 P.2d 425, 13 A.L.R.2d 1427.

Petitioner makes no attempt to explain how a federal court under the Supremacy clause or otherwise can grant to a state court party an immunity from state prosecution which could not even be granted by the highest court of the state.

CONCLUSION

Viewed separately or collectively, the arguments advanced to deny the privilege amount to a broadly based threat to the application of the privilege in the very large area of commercial intercourse wherein its application has never before been doubted. The Court of Appeals correctly held that there was no waiver. The contrary assertion is unsupported either by reason or authority. In the final analysis, a contrary decision would amount to an abrogation of the Fifth Amendment privilege in the broad context of commercial transactions.

For a waiver to be effective, it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege. *Johnson* v. *Zerbst* (1938), 304 U.S. 458, 58 S.Ct. 1019. *Brookhart* v.

Janis (1966), 384 U.S. 1, 86 S.Ct. 1245. When the waiver of fundamental constitutional rights is claimed, the ordinary burden resting upon the party claiming waiver is increased by strong presumptions against the intentional relinquishment of such rights.

In *Brookhart* v. *Janis* (1966), 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314, the Court said:

> "There is a presumption against the waiver of constitutional rights, see, e.g., Glasser v. United States, 315 U.S. 60, 70-71, 62 S.Ct. 457, 464-465, 86 L.Ed. 680, and for a waiver to be effective it must be *clearly established* that there was 'an intentional relinquishment or abandonment of a known right or privilege'" (Emphasis ours) (86 S.Ct. at 1247).*

The liberality with which the privilege is viewed by federal standards was expanded in *Hoffman* v. *United States* (1951), 341 U.S. 479, 71 S.Ct. 814, wherein it was held that the privilege could be validly claimed where an answer to an interrogatory could possibly tend to incriminate or could possibly furnish a link in a chain of circumstances which might lead to criminal prosecution.

In the instant case, the complaint includes an express charge of fraudulent concealment for the purpose of defeating a judgment lien, the crime of larceny under the Mississippi statutes. (*Mississippi Code of 1942*, §§ 2250 and 2252).

In *Boyd* v. *United States* (1886), 116 U.S. 616, 6 S.Ct. 524, the Court said:

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*Also: *Johnson* v. *Zerbst* (1938), 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; *Smith* v. *United States* (1949), 337 U.S. 137, 69 S.Ct. 1000; *Emspak* v. *United States* (1955), 349 U.S. 190, 75 S.Ct. 687; *Chapman* v. *State of California* (1967), 386 U.S. 18, 87 S.Ct. 824; *Curtis Publishing Co.* v. *Butts* (1967), 388 U.S. 130, 87 S.Ct. 1975.

"And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government . . . ." (6 S.Ct. at 533).

Specifically in debtor collection proceedings, the federal rule has evolved from bankruptcy cases: *Arndstein* v. *McCarthy* (1920), 254 U.S. 71, 41 S.Ct. 26; *Arndstein* v. *McCarthy* (1920), 254 U.S. 379, 41 S.Ct. 136; *McCarthy* v. *Arndstein* (1923), 262 U.S. 355, 43 S.Ct. 562; and *McCarthy* v. *Arndstein* (1924), 266 U.S. 34, 45 S.Ct. 16. These cases are directly in point. They stand both for the existence of the privilege in connection with collection proceedings and for the non-waiver of the privilege. They hold, in brief, that a bankrupt may claim the privilege when interrogated to discover his estate not listed in his schedule of assets where concealment of assets is a criminal offense.

There has never been the slightest departure from the *McCarthy* cases and numerous other cases have cited and reaffirmed the principles there announced, and these include such other landmark cases as *Hoffman* v. *United States* (1951), 341 U.S. 479, 71 S.Ct. 814 and *Malloy* v. *Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, 1495.

Other recent cases have cited *McCarthy* and also *Boyd* to the point that the great privilege applies in all forms of proceedings and investigations and is to be liberally granted and is not to be watered down or eroded.*

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*Emspak v. *United States* (1955), 349 U.S. 190, 75 S.Ct. 687; *Blau* v. *United States* (1950), 340 U.S. 159, 71 S.Ct. 223; *Ullmann* v. *United States* (1955), 350 U.S. 422, 76 S.Ct. 497; *In re Grobian's Petition* (1957), 352 U.S. 330, 77 S.Ct. 510; *Brown* v. *United States* (1958), 356 U.S. 148, 78 S.Ct. 622; *Fay* v. *Noia* (1963), 372 U.S. 391, 83 S.Ct. 822; *Murphy* v. *Waterfront Commission of New York Harbor* (1964), 378 U.S. 52, 84 S.Ct. 1594, 1611; *Miranda* v. *Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602; *Application of Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 1454; and *United States* v. *Kordel* (1970), 90 S.Ct. 763.

As to the printed 1960 bond application relied upon, this is no different from the promise of any debtor to pay his debt and place his creditor in funds when the debt matures. To establish a precedent of waiver on the basis of this private contract document could only mean that in time the great privilege would be rubber-stamped out of existence by a few stock words in commercial contracts. Any distinction on the basis of an assumed creation of a "fiduciary relationship" would rule out the privilege in cases, for example, where the charge is one of embezzlement. This has never been the law, as to which see: *Ex parte Berman* (1930), 105 Cal. App. 371, 287 P. 125.

In 1964 it was decided in *Malloy* v. *Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, that state courts were bound by the Fifth by force of the Fourteenth Amendment and by the standards enunciated by the federal courts for its application. In *Ullmann* v. *United States* (1956), 350 U.S. 422, 76 S.Ct. 497, the Court held that "This constitutional protection must not be interpreted in a hostile or niggardly spirit." (76 S.Ct. at 500).

In *Malloy* v. *Hogan*, supra, the Supreme Court held that the State could not use a "less stringent" standard or employ a "watered-down subjective version of the individual guarantees of the Bill of Rights."

We respectfully submit that certiorari should be denied and the Petition should be dismissed.

Respectfully submitted,

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